

THE QUEEN,

AT THE PROSECUTION OF DENIS CAULFIELD HERON,

AGAINST

THE VISITERS OF TRINITY COLLEGE,

DUBLIN.

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THE JUDGMENT
OF THE
COURT OF QUEEN'S BENCH,
DELIVERED BY
THE LORD CHIEF JUSTICE PENNEFATHER,
JUNE 10TH, 1845.

Heron, Denis Caulfield

REPORTED BY
W. NEILSON HANCOCK, ESQ.,
ONE OF THE COUNSEL IN THE CASE.

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PREFACE.

THE Judgment of the Court of Queen's Bench in Mr. Heron's case contains a valuable exposition of the nature and extent of visitatorial authority in Trinity College, which is a matter of considerable interest at present.

The report of this judgment, prepared for the Irish Law Reports, will not, I am informed, be published until after a further delay of some months.

I have, therefore, prepared the following Report from very accurate notes of the Judgment, taken by myself at the time of its delivery.

W. N. H.

64, Talbot-street,
29th November, 1845.

JUDGMENT,

&c. &c.

IN THE QUEEN'S BENCH,

TRINITY TERM, 1845.

THE QUEEN *at the Prosecution of* DENIS CAULFIELD
HERON, *against the* ARCHBISHOP OF ARMAGH *and*
ARCHBISHOP OF DUBLIN, *Visitors of Trinity College,*
Dublin.

THIS was a case of a *mandamus* and a return, and came before the Court on a *concilium* to determine on the sufficiency of the return. It was argued by *Holmes* and *O'Hagan*, for the Prosecutor; and by *Napier*, Q. C. and *Millar*, for the Visitors. The judgment of the Court, which was delivered by the Lord Chief Justice PENNEFATHER, the rest of the Court, Justices BURTON, CRAMPTON, and PERRIN, concurring, contains a full statement of the *mandamus* and return.

PENNEFATHER, *Chief Justice*.—In this case a *mandamus* has issued at the suit of Mr. Heron against the Visitors of Trinity College, and the prayer of the *mandamus* is that the Visitors may be ordered to proceed to hear and to deter-

mine the appeal of Mr. Heron, and the mandatory part of the writ commands the Visitors to hear and determine the appeal. The writ sets out the circumstances under which the prosecutor, Mr. Heron, applied for the protection and interference of the Court in his favour.

The writ is directed to the Primate and to the Archbishop of Dublin as Visitors. It states, by way of recital, that Queen Elizabeth, by royal charter, dated 3rd of March, in the thirty-fourth year of her reign, founded and appointed that there should be a College for the education of youth and students in arts and sciences near Dublin. It recites a patent of confirmation of King Charles the First, dated 25th May, in the fifteenth year of his reign, whereby he appointed the Chancellor, or, in his absence, the Vice-Chancellor, who is now the Lord Primate, and the Archbishop of Dublin, Visitors. It states, that of the same date King Charles the First did make and appoint certain statutes for the better government of the College, whereby he appointed certain days and times for the examination of candidates for scholarships in the College, and otherwise regulated the examination and election thereof; and whereby he enacted, that the Scholars of the College should be seventy in number; and that, so often as the place of any Scholar should become vacant, some fit and proper person should be elected to such vacancy, by the Provost and Senior Fellows; and that in such election, regard should be had to poverty, talent, learning, and virtue, and the more any of the candidates excelled in these, the more, as was just, he should be preferred.

The writ then states, that on the 1st June, 1843, sixteen places being vacant in the body of Scholars, and several persons, exceeding sixteen in number, offering themselves as candidates, the Provost and Senior Fellows, for the time being, proceeded to an examination of the candidates, in

order to ascertain their qualifications; that Mr. Heron, a Sizar of the College, attended the examination as a candidate, and was examined, and that a list was subsequently made out, by order of the Provost and Senior Fellows, ranging in order of merit the candidates who had attended and been examined, on which list Mr. Heron's name appeared the fifth in order of merit.

The writ then states, that on the 12th of June, 1843, the day appointed by the statutes, the Provost and Senior Fellows proceeded to make the election, and to fill up the sixteen vacant places of Scholars; that they elected sixteen of the candidates, in the order of merit in which they stood on the list, with the exception of Mr. Heron, and that they rejected Mr. Heron, and declined to elect him to one of the sixteen vacant places of Scholars, on the ground by them assigned that he had not received the sacrament of the Lord's Supper according to the usage of the United Church of England and Ireland, in the chapel of the College, on the Sunday immediately preceding the day appointed for the election of Scholars, and on the further ground by them also assigned, that he was a member of the denomination of Christians commonly called Roman Catholics, and for no other reason whatever.

The writ then states, that Mr. Heron had been advised, that inasmuch as eleven of the sixteen persons so elected to be Scholars, had been, on the examination held pursuant to the statutes, declared by the Provost and Senior Fellows inferior in merit to him, he was entitled, according to the provisions of the statutes, to one of the sixteen places of Scholars vacant before the election.

The writ then states, that the Primate and Archbishop of Dublin were and are the Visitors of the College; and that on the 1st of November, 1843, Mr. Heron made an application to them in the nature of an appeal against the decision of the

Provost and Senior Fellows, in which he prayed that they would hear his appeal, would institute an inquiry into his case, and would adopt such means as might seem good to them as Visitors for securing to him the place and advantages of scholarship in the College, to which he claimed to be rightfully entitled, or would otherwise determine the matter of his appeal; and that, notwithstanding his application, the Visitors did absolutely refuse to hear and determine his appeal. The writ of *mandamus* then concludes with the command which I first noticed.

The Visitors have made a return to the following effect:—They state the patent of Queen Elizabeth, as mentioned in the writ; and add, that the Corporation of the College was made to consist of the Provost, Fellows, and Scholars. They state the patent of King Charles the First mentioned in the writ, and add the following passage:

“ Similiter etiam si contigerit Sociorum Juniorum et
 “ Scholarium aliquem ullo modo deesse et amoveri, morte,
 “ decessu, resignatione, deprivatione, vel alio quovis modo
 “ quod tunc et deinceps bene liceat et licebit Præposito et So-
 “ ciis Senioribus vel majori parti eorundem pro tempore exis-
 “ tentium una cum Præposito aliam idoneam personam aut
 “ alias idoneas personas in locum vel locos prædicti Socii
 “ Junioris aut Scholaris Sociorum Juniorum aut Scholarium
 “ die Lunæ post Dominicam Sanctæ Trinitatis ad tunc prox-
 “ ime sequentem eligere nominare et constituere juxta Statuta
 “ nostra prædicta in hoc casu provisa et sic de tempore in
 “ tempus toties quoties mors, decessus, resignatio, vel deprivatio
 “ contingeret quodque quilibet eorum in hujusmodi locum vel
 “ locos, Præpositi, Sociorum Seniorum, Sociorum Juniorum,
 “ vel Scholarium respective sic (ut præfertur) electus habeat
 “ et gaudeat ac habere et gaudere valeat et possit adeo ple-
 “ nam et liberam potestatem auctoritatemque in omnibus, et
 “ per omnia, et ad omnia, et singula agenda perimplenda et

“ exigenda prout ipse Præpositus, vel aliquis alius Sociorum
 “ Seniorum, Sociorum Juniorum, vel Scholarium dicti Col-
 “ legii pro tempore existentium quovis modo habere seu
 “ gaudere debeant aut possint juxta tenorem prædictorum
 “ statutorum nostrorum in hoc casu designatorum(a).”

It is quite plain that the mode of election thus pointed out in this passage of the charter, confirming this power, did not give the Provost and Senior Fellows anything like a capricious power of election; but in the election due regard must be had to the statutes of the College.

The Visitors then state that King Charles the First gave certain statutes for the better government of the College, by the first head of which it is ordained as follows:

“ Corpus Collegii constare volumus ex Præposito tanquam
 “ capite et ex Sociis et Scholaribus tanquam nobilioribus
 “ hujus corporis membris(b).”

The Visitors then state, that by the fourth head of these statutes, the authority of the Provost and seven Senior Fellows is ordained in these words:

“ Quia in omni societate benè constituendâ paritas mem-
 “ brorum maximè caveri debet utpote quæ anarchiam, et
 “ rerum omnium confusionem inducat idcirco, Præpositum
 “ hujus Societatis caput constituimus eumque auctoritate
 “ summâ in moderandis personis et negotiis Collegii et in
 “ omnibus aliis quæ ad Collegii regimen quovis modo spec-
 “ tant, vel spectare possunt munimus. Quo melius autem
 “ munere suo fungatur ordinamus et volumus, ut e toto So-
 “ ciorum numero septem maxime seniores Socii ei sint tan-
 “ quam assessores et ut eorum consilio et auxilio omnia ma-
 “ jora Collegii negotia tractet sive ad mores sive ad doctrinam
 “ sive œconomiam spectantia et hi septem Socii Seniores vo-
 “ centur. Horum autem auctoritas qualis esse debeat partim

(a) College Statutes, &c., Mac Donnell's edition, p. 20.

(b) Ib. p. 31.

“ hîc et partim aliis variis Statutis Collegii exponitur. Vo-
 “ lumus igitur ut Præpositus et horum Seniorum pars major
 “ (nempe quatuor) Collegii regimen electiones omnes Soci-
 “ orum Officiariorum, Discipulorum, et Ministrorum Col-
 “ legii graduumque collationes definiant et concludant. In
 “ quibus omnibus definiendis Præpositum, aut eo absente,
 “ Vicepræpositum, unum semper esse volumus(*a*).”

It is quite certain that great power is intentionally and purposely conferred on the Provost and Senior Fellows, who form what is commonly called the Board of the College. The founder intended them to have great power and authority in the matter of elections, as also the power of interfering and regulating all other matters belonging to the College. The conferring of such great power on the Provost and Senior Fellows was considered salutary, without any particular distinction being taken as to this or that power in this or that business.

The Visitors then return that by the statutes of Charles, provision is made for the qualification of Scholars in these words:

“ In Discipulorum electione quoties locus aliquis quocun-
 “ que modo vacaverit volumus et statuimus ut a Præposito,
 “ et septem senioribus aut saltem majore parte eorundem
 “ alius aptus et habilis in locum vacuum assumatur. In quâ
 “ electione habeatur ratio inopiæ ingenii, doctrinæ, virtutis,
 “ et quo magis quisque ex eligendorum numero his excedit
 “ eo magis ut æquum est præferatur. Omnes qui Discipu-
 “ latum in Collegio petunt ab electoribus ab horâ octavâ
 “ antemeridianâ ad decimam et ab horâ secundâ pomeridianâ
 “ ad quartam per duos dies diligentèr quid in grammaticâ
 “ et literis humanioribus possint examinentur”(b).

Then there is a preference to be given to those educated

(*a*) College Statutes, &c., Mac Donnell's edition, p. 35.

(*b*) Ibid., p. 36.

in Dublin Schools, or born in counties where the College has property, for the reason, as stated in the statutes, that the sons of those who contribute to the support of the College, may be educated in a manner that shall be of advantage to Church and State. Heirs present or future are not to be elected.

The Visitors then return the statute concerning the form of election to be observed as follows :

“ Quoniam ad regimen Collegii permultum conducit legi-
 “ timam in electionibus formam observari, volumus ut quoties
 “ Socii juniores vel Discipuli eligendi sint peractâ exami-
 “ natione per Statuta requisitâ Præpositus et Socii Seniores
 “ ad monitum Præpositi convenient in Sacello et perlectis
 “ statutis *De eorum qualitate et electione* una cum hoc
 “ capite *De forma et tempore electionum*, nomina candi-
 “ datorum publice a primario Lectore recitabuntur. Quo
 “ peracto quisque elector hoc juramentum dabit.

“ Ego, G. C. Deum testor in conscientiâ meâ me statuta
 “ nuper lecta fideliter et integre observaturum et illum vel
 “ illos in Socium vel Socios aut Scholarem discipulum sive
 “ Scholares discipulos nominaturum et electurum quem vel
 “ quos Statuta nuper lecta significare et apertius describere
 “ mea conscientia judicabit omni illegitimâ affectione, odio,
 “ amore, et similibus sepositis”(a).

The electors are therefore bound to elect the person whom the statutes point out. This form of election makes it a very solemn proceeding on behalf of those to whom the statutes intrust the power. They are under a solemn responsibility to be actuated and guided only by the statutes of the College. The election is, therefore, an exceedingly solemn proceeding, and it is not stated that any thing has been done through fear, favour, or affection, or improper motives in the election from which the appeal has been brought.

(a) College Statutes, &c., Mac Donnell's Edition, p. 96.

The return then states the facts of the number of vacancies in Scholarships having been of sixteen, of the election having been held, and of the vacancies having been duly filled.

The Visitors then go on to state their own position. It is very observable that there is no restriction imposed on their office and duties. They appear to be general Visitors, their duties extending to everything which may require the superintendence of Visitors. The language of the passages of the statutes set out in the return is very extensive to shew the extent of the power which was to be conferred on the persons who should thereafter come to fill the office of Visitor. Persons high in rank, and who must be considered altogether incapable of violating the important duties of the office cast upon them—persons who might safely be intrusted with the care of all that regarded the preservation of the College.

The Visitors are further empowered by the statutes “ut omnes lites, actiones, et controversias, quas Præpositus et major pars Seniorum Sociorum pro tempore existentium non possint componere dirimant et definiant”(a). There is no distinction here as to the subject matter of the complaint which the Visitors are empowered to decide. There is nothing presumed or assumed so as to make one assume that there was anything that the Visitors had not equal power of inquiry over.

The Visitors are further empowered “et quod in omnia delicta ab ipso Præposito et Sociis Senioribus Collegii prædicti non emendata animadvertant”(b). There is no class of cases not subject to their power. No individual, however high or exalted in the College, but is supposed to be capable of falling into error, and as often as such an event shall

(a) College Statutes, &c., Mac Donnell's Edition, p. 27.

(b) Ibid., p. 27.

happen, power is given to the Visitors of coming to a conclusion on the subject matter of that error. The Visitors next return a passage of the statutes, providing that all domestic disputes should be decided within the College. But this passage contains the following remarkable clause:—
 “ appellationem tamen ex justâ causâ gravaminis ad Visitatores Collegii non impedimus. Sed ne frequenti appellatione Collegio dedecus aut Visitatoribus nimia creatur molestia licebit iis ineptè et de levi appellantem rejicere”(a).

It appears, therefore, that the power of the Visitors is totally unrestrained. This power is assumed to extend to every thing of which just complaint might be made; this power clearly extends to those things which relate to the purity of election, and to the manner in which elections are conducted. Such a case as the present is a case of the kind that the founder of this College contemplated, as proper to be the subject of appeal to the Visitors. The phrase “*inepte et de levi appellantem*” shews the strong distinction between absurd and unfounded complaints to be rejected as such, and appeals on important matters. Then the Visitors return the power(b) of interpretation given to them in certain cases, and though the present is not a proceeding under that clause, the clause appears proper to advert to here, to shew another instance of the founder’s willingness to have causes of complaint, proper to be entertained, entertained and investigated by the Visitors. There is, in fact, nothing not open to the Visitors to entertain, and this conclusion appears on the face of the return the Visitors have made. I have taken pains to shew that the Visitors are competent to investigate, inasmuch as the defence made by them is, that they have no jurisdiction.

(a) College Statutes, &c., Mac Donnell’s Edition, p. 54.

(b) *Ib.* p. 102.

The Charter of William IV. (a) is set out in the return, and, as appears to me, without any occasion, for the construction put upon that charter by the counsel for the prosecutor is perfectly correct. It refers to solemn visitations, and not to an appeal like the present case. Formerly the Visitors were compelled to hold solemn visitations at stated periods; first triennially, and then annually. By the Charter of William IV. they are relieved from this compulsion, and they may now choose the times of holding solemn visitations. But that Charter of William IV. does not give the Visitors a power of election, whether they will hear this appeal or not.

The Visitors conclude their return by saying : “ We are “ advised and submit that the said Provost and Senior Fellows were fully empowered by the said statutes finally to “ perfect and complete the election of candidates for the “ said sixteen places for Scholars, without any appeal to us, “ as Visitors of said College, from said election, when duly “ completed ; and that we had not in or during the said “ year 1843, or at any time since, and did not derive under “ said statutes, or from any other sufficient authority, any “ jurisdiction, power, or right whatsoever, as such Visitors “ as aforesaid, to hear the matter of the said appeal of the “ said D. C. Heron, against the election of candidates for “ Scholarships in 1843, or to institute inquiry into his case, “ or to adopt means for securing the place of Scholar which “ he claimed, or otherwise to determine his appeal.” As to the statement, that the Visitors have, according to the discretion vested in them, rejected Mr. Heron’s appeal, I pass that by, as I have already said the Charter of William IV. gave them no such discretion.

I will make a few observations on the nature and position

(a) College Statutes, &c., Mac Donnell’s Edition, p. 293.

of the office of Visiter, which the Primate and Archbishop of Dublin are called on to exercise. A great many cases have been cited, but I find the subject well stated in 1 Blackstone's Commentaries, p. 479:

“The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder.

“I proceed, therefore, next to inquire how these corporations may be visited ; for, corporations being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary.” * * “With respect to all lay corporations, the founder, his heirs, or assigns, are the Visitors, whether the foundation be civil or eleemosynary.” And again, p. 483, “But whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons, and that the right of visitation does not arise from any principles of the canon law, but, of necessity, was created by the common law. And yet the power and jurisdiction of Visitors in colleges was left so much in the dark at common law that the whole doctrine was very unsettled till the famous case of *Phillips and Bury(a)*. In this the main question was, whether the sentence of the Bishop of Exeter, who, as Visiter, had deprived Doctor Bury, the

(a) Lord Raym. 5 ; 4 Mod. 106 ; Show. 35 ; Skinn. 407 ; Salk. 403 ; Carthew, 108.

“ Rector of Exeter College, could be examined and redressed by the Court of King’s Bench. And the three puisne Judges were of opinion that it might be reviewed, for that the Visitor’s jurisdiction could not exclude the common law, and accordingly judgment was given in that Court. But the Lord Chief Justice HOLT was of a contrary opinion, and held, that by the common law, the office of Visitor is to judge according to the statutes of the College, and to expel and deprive upon just occasions, and to hear all appeals of course, and that from him, and him only, the party aggrieved ought to have redress, the founder having reposed in him so entire a confidence that he will administer justice impartially, that his determinations are final, and examinable in no other Court whatsoever. And upon this a writ of error being brought into the House of Lords, they concurred in Sir John Holt’s opinion, and reversed the judgment of the Court of King’s Bench ; to which leading case all subsequent determinations have been conformable.”

Now there is nothing in these Charters, from beginning to end, to limit the general uncontrolled power extending to all cases, which is thus deemed at common law to be in the Visitor of a College.

There is an authority which points out very strongly the judgment we ought to give in this case—*R. v. Bishop of Lincoln*, in 2 Term Reports, 338(n): “ where a *mandamus* was prayed to the Bishop as Visitor of Lincoln College, Oxford, to compel him to receive, hear, and determine an appeal of Dr. Halifax, who complained of an undue election to the office of Rector of that College, to which Mr. Horner had been admitted. The Court determined that where, by the statutes of a college, a Visitor is appointed who is to interpret the statutes, and an appeal is lodged with him, the Court will compel him to hear the parties, and form some judg-

“ment, though they will not oblige him to go into the merits, “for it is sufficient if he decide that the appeal comes too “late.” In conformity with that judgment we decide that these Visitors shall be put in motion without at all suggesting the judgment they ought to form. They may, perhaps, reject the appeal altogether. They may find grounds for deciding against Mr. Heron, perhaps in the Scholar’s oath, perhaps in the duties required of Scholars, perhaps in the statutes. All these things are to be considered by the Visitors and not by this court.

What extent of authority the Visitors can exercise in this case is shown in a passage in the statutes, not stated in the return of the Visitors.

“Idcirco Visitatoribus Collegii in Chartâ nostrâ regiâ
 “designatis, potestatem concedimus et insuper rogamus eos
 “in Domino ut semel in unoquoque triennio per se, vel per
 “alios ad id muneris deputatos hoc Collegium adeant ut
 “Præpositum, Vicepræpositum, Decanos, Bursarium Præ-
 “lectores, Socios, Scholares, et Discipulos omnes Collegii in
 “unum convocare possint, et velint Collegium tam in capite
 “quam in membris visitare ac de et super omnibus et sin-
 “gulis statum commodum honorem et dicti Collegii Statuta
 “Præpositi, Vicepræpositi, Bursarii, Decanorum, Prelecto-
 “rum, Sociorum, Scholarium, discipulorum et ministrorum
 “reformationem et correctionem concernentibus diligenter
 “inquirere juramentum de dicendo veritatem in præmissis
 “omnibus et singulis ab eisdem exigere crimina excessus
 “delicta et negligentias quorumcunque dicti Collegii quali-
 “tercunque commissa in eâ visitatione comperta secundum
 “criminum excessuum delictorum et negligentiarum quali-
 “tatem et exigentiam et juxta horum Statutorum tenorem
 “debitè punire et reformare aut ut puniantur et refoventur
 “per Præpositum vel quorum interest curare cæteraque om-
 “nia et singula facere et exercere quæ ad eorum correctio-

“nem et reformationem sunt necessaria aut quovis modo
 “opportuna etiamsi illud ad privationem seu amotionem
 “Præpositi, Vicepræpositi, aut alterius cujuscunque ab ad-
 “ministratone vel officio seu ad amotionem alicujus Socii
 “Scholaris vel discipuli ab hoc Collegio (si tamen hoc ipsum
 “Statuta Collegii exigant”)(a).

Here is extreme power given to the Visitors, and there is no person in College who is not by express terms subject to it. Then by common law the Visitors have an extensive power unless restrained, and here is no restraint. I am of opinion that the Visitors have misconceived their duties. This appeal is in a matter of much consequence, and one which deeply concerns the character of the College. This person appealing was a member of the College. He had sworn to obey the statutes of the College when admitted a Sizar. He was at any rate admitted a member of that College. If he had rights at that time, and was entitled in order of merit to be elected a Scholar, he has had a good ground for appeal, and his appeal ought to have been heard. His appeal cannot for an instant be considered frivolous or vexatious: it is one in which the interests of the College are much involved. On the whole, I think, we have a direct precedent in the case of *R. v. Bishop of Lincoln*, which I have referred to, and the judgment of the Court is, that the visitatorial power be put in motion by the awarding of the peremptory mandamus to the effect prayed by the prosecutor.

(a) College Statutes, &c., Mac Donnell's edition, p. 104.